KERAJAAN MALAYSIA v. MUDEK SDN BHD

FEDERAL COURT, PUTRAJAYA
SURIYADI HALIM OMAR FCJ
ZAINUN ALI FCJ
ZAHARAH IBRAHIM FCJ
PRASAD SANDOSHAM ABRAHAM FCJ
JEFFREY TAN FCJ
[CIVIL APPLICATION NO: 01(f)-12-05-2016(B)]
2 OCTOBER 2017

CIVIL PROCEDURE: *Summary judgment – Triable issues – Recovery proceedings for tax – Whether there was chargeable gain – Whether there was triable issue – Whether there has been chargeable gain accruing and/or disposal of assets between buyer and seller prior to assessment raised against taxpayer – Whether issue as to chargeable gain accrued and/or disposal of assets constituted triable issue – Right forum to hear and decide on whether there has been chargeable gain accruing and/or disposal of assets under assessment raised – Rules of the High Court 1980, O. 14*

REVENUE LAW: *Income tax – Chargeable gain – Recovery proceedings for tax – Whether there was chargeable gain – Whether there was triable issue – Whether there has been chargeable gain accruing and/or disposal of assets between buyer and seller prior to assessment raised against taxpayer – Whether issue as to chargeable gain had accrued and/or disposal of assets constituted triable issue – Right forum to hear and decide on whether there has been chargeable gain accruing and/or disposal of assets under assessment raised – Whether appeal lodged – Real Property Gains Tax Act 1976, ss. 18, 21 & 23*

The respondent entered into a sale and purchase agreement with Yeng Chong Realty Sdn Bhd ('YC') where the former agreed to sell to the latter a piece of land. However, the sale of the said land to YC was not completed as YC did not fulfil its obligations under the agreement. The respondent further contended that it could not be said to have 'disposed' of the said land nor could it be said that a 'chargeable gain' had accrued to the appellant within the meaning of the Real Property Gains Tax Act 1976 ('the Act'). As the respondent did not avail itself of the appeal process under s. 18 of the Act, the tax then became due and payable and the appellant was entitled to file recovery proceedings for the tax due pursuant to s. 23 of the Act. After filing the recovery proceedings in the High Court, the appellant filed an application for summary judgment pursuant to O. 14 of the Rules of the High Court 1980. The High Court allowed the application but the decision was set aside by the Court of Appeal ('the COA') which, in its majority judgment, held that since the consideration sum was not paid and there was no chargeable gain, there was a triable issue. Hence, the present appeal. The issues that arose for determination were (i) whether, in hearing and deciding the application for

summary judgment in a civil action for the recovery of tax due and payable by the taxpayer under s. 23 of the Act, the court could entertain the issue of whether there has been a chargeable gain accruing and/or disposal of assets between the buyer and the seller prior to the assessment raised against the taxpayer; (ii) whether, in deciding the civil claim, the issue as to a chargeable gain had accrued and/or disposal of assets raised a triable issue; and (iii) which was the right forum to hear and decide regarding the facts on whether there has been a chargeable gain accruing and/or disposal of assets under the assessment raised.

Held (allowing appeal with costs)

Per Prasad Sandosham Abraham FCJ delivering the judgment of the court:

(1) Pursuant to s. 21(1) of the Act, once a notice of assessment has been served, the tax payable would be due and payable. If the respondent felt aggrieved by the issue of no chargeable gain arising, it should have lodged an appeal to the Special Commissioners of Income Tax ('SCIT') pursuant to s. 18 of the Act. Since no appeal was lodged, this issue was precluded from being raised as a triable issue pursuant to s. 23(3) of the Act. The majority judgment of the COA failed to consider all the relevant provisions of the Act, particularly ss. 18 and 23(3). Therefore, it was *per incuriam* the provisions of the Act. (para 12)

(2) The majority judgment of the COA would cause confusion to parties and legal advisors alike as it did not reflect the correct position of the law. The judgment failed to consider cases on this area of the laws and propositions emanating from them nor afforded an explanation, despite the strong pronouncement in these cases, why it felt that the issue of no chargeable gain constituted a triable issue in the context of the Act. The majority judgment of the COA was erroneous and set aside. The views expressed in the dissenting judgment was preferred. (paras 2, 11 & 13)

(3) Questions (i) and (ii) were answered in the negative and with regards to question (iii), the proper forum to hear the said issue would be the SCIT, pursuant to s. 18 of the Act. (para 15)

Bahasa Malaysia *Headnotes*

Responden memeterai satu perjanjian jual beli dengan Yeng Chong Realty Sdn Bhd ('YC') dan bersetuju menjual sebidang tanah kepada YC. Namun begitu, jualan tanah kepada YC tidak disempurnakan kerana YC tidak memenuhi kewajipannya bawah perjanjian tersebut. Responden seterusnya menghujahkan bahawa tanah tersebut tidak boleh dikatakan telah 'dilupuskan' dan 'keuntungan yang boleh dikenakan cukai' tidak boleh dikatakan terakru terhadap perayu dalam maksud Akta Cukai Keuntungan Harta Tanah 1976 ('Akta'). Oleh kerana responden tidak melalui proses rayuan bawah s. 18 Akta, cukai genap masanya dan perlu dibayar dan perayu berhak memfailkan prosiding tuntutan cukai yang genap masanya bawah s. 23 Akta. Selepas memfailkan prosiding tuntutan di Mahkamah Tinggi,

perayu memfailkan permohonan penghakiman ringkas bawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Mahkamah Tinggi membenarkan permohonan tersebut tetapi keputusannya diketepikan oleh Mahkamah Rayuan ('MR') yang, dalam penghakiman majoritinya, memutuskan bahawa kerana jumlah balasan tidak dibayar dan tiada keuntungan yang boleh dikenakan cukai, terdapat isu yang boleh dibicarakan. Maka timbul rayuan ini. Isu-isu berbangkit bagi pemutusan mahkamah adalah (i) sama ada, dalam membicarakan dan memutuskan permohonan penghakiman ringkas dalam tindakan sivil bagi tuntutan cukai yang genap masanya dan dikenakan bayaran terhadap pembayar cukai bawah s. 23 Akta, mahkamah boleh melayan isu sama ada keuntungan yang boleh dikenakan cukai terakru dan/atau pelupusan aset antara pembayar dan penjual sebelum taksiran dibuat terhadap pembayar cukai; (ii) sama ada, dalam memutuskan tuntutan sivil pemohon, isu keuntungan yang boleh dikenakan cukai terakru dan/atau pelupusan aset membangkitkan isu yang boleh dibicarakan; dan (iii) forum yang betul untuk membicarakan dan memutuskan fakta-fakta sama ada terdapat keuntungan yang boleh dikenakan cukai terakru dan/atau pelupusan aset bawah taksiran yang dikemukakan oleh pemohon.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Prasad Sandosham Abraham HMP menyampaikan penghakiman mahkamah:

(1) Bawah s. 21(1) Akta, apabila notis taksiran telah diserahkan, cukai yang perlu dibayar genap masanya dan perlu dibayar. Jika responden terkilan dengan isu tiada keuntungan yang boleh dicukai berbangkit, responden sepatutnya merayu kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') bawah s. 18 Akta. Oleh kerana rayuan tidak difailkan, isu ini terkecuali daripada dibangkitkan sebagai isu yang boleh dibicarakan bawah s. 23 Akta. Penghakiman majoriti MR tidak mempertimbangkan kesemua peruntukan Akta, khususnya ss. 18 dan 23(3). Ini *per incuriam* peruntukan-peruntukan Akta.

(2) Penghakiman majoriti MR akan menimbulkan kekeliruan antara pihak-pihak dan sesama penasihat-penasihat undang-undang kerana tidak mencerminkan kedudukan sebenar undang-undang. Penghakiman tidak mengambil kira kes-kes berkenaan undang-undang tersebut dan usul-usul yang berasal daripadanya mahupun mengemukakan penjelasan, walaupun terdapat penegasan kuat dalam kes-kes ini, mengapa MR berpendapat isu tiada keuntungan yang boleh dicukai membentuk isu yang boleh dibicarakan dalam konteks Akta. Penghakiman majoriti MR terkhilaf dan diketepikan. Pendapat-pendapat dalam penghakiman menentang diterima.

(3) Soalan (i) dan (ii) dijawab secara negatif dan bagi soalan (iii), forum yang lebih sesuai mendengar isu tersebut, menurut s. 18 Akta, adalah PKCP.

A **Case(s) referred to:**
Chong Woo Yit v. Government of Malaysia [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9 SC ***(refd)***
Government of Malaysia v. Abdul Rahman [1974] 1 LNS 40 HC ***(refd)***
Sun Man Tobacco Co Ltd v. Government of Malaysia [1973] 1 LNS 144 FC ***(refd)***

B **Legislation referred to:**
Real Property Gains Tax Act 1976, ss. 14, 15, 17, 18, 21(1), 23(1), (3), 24
Rules of the High Court 1980, O. 14

For the appellant - Mohd Harris Hanapi; SFC & Ridzuan Othman; FC
For the respondent - Deborah J Kaur; M/s Soraya Jabid Deborah & Co

C *[Editor's note: For the Court of Appeal judgment, please see Mudek Sdn Bhd v. Kerajaan Malaysia [2013] 1 LNS 281 (overruled).]*

Reported by Najib Tamby

JUDGMENT

D

Prasad Sandosham Abraham FCJ:

[1] This appeal came up for disposal on 20 July 2017. The leave questions before us are as follows:

E (i) Whether in hearing and deciding the application for summary judgment in a civil action for the recovery of tax due and payable by the taxpayer under s. 23(1) of the Real Property Gains Tax Act 1976, the court can entertain the issue of whether there has been a chargeable gain accruing and/or disposal of assets between the buyer and the seller prior to the assessment raised against the taxpayer.

F (ii) Whether in deciding the applicant's civil claim under s. 23(1) of the Property Gains Tax 1976, the issue as to a chargeable gain had accrued and/or disposal of assets raised a triable issue.

(iii) Which is the right forum to hear and decide regarding the facts on G whether there has been a chargeable gain accruing and/or disposal of assets under the assessment raised by the applicant.

[2] Before proceedings could commence, counsel for the respondent informed the court that he had reached an amicable settlement with the appellant. After some clarification made by the parties, the court allowed the H appeal, and the order of the Court of Appeal was set aside. We observed that the majority judgment of the Court of Appeal would remain on record, and unless dealt with, would cause confusion to parties and legal advisors alike as it does not reflect the correct position of the law. For the aforesaid reasons, we delivered judgment immediately and indicated to parties that our grounds I of judgment will follow subsequently.

[3] Very briefly the facts of the case are as follows: A

On 23 April 1997 the respondent entered into a sale and purchase agreement with a company known as Yeng Chong Realty Sdn Bhd (Yeng Chong) wherein the respondent agreed to sell to Yeng Chong a piece of land located in Melaka (the said land) for RM31,739,793.62. The respondent asserted that the sale of the said land to Yeng Chong was not completed as Yeng Chong did not fulfil its obligations under the sale and purchase agreement. As such the respondent contended that it could not be said to have "disposed" of the said land, nor could it be said that a "chargeable gain" had accrued to the appellant within the meaning of the Real Property Gains Tax (RPGT) Act. Therefore, according to the respondent, it was not liable at all to pay any RPGT under the law. The respondent asserted that it had filed two civil suits No: S-22-1468-2002 and S-22-448-2005 against Yeng Chong in respect of the purchase price payable for the said land, which suits have not yet been concluded. B C

[4] Before we proceed to deal with the law, the current "mother ship" of Taxing Acts is the Income Tax Act 1967 (Act 53). For specialised areas of transactions, the Legislature enacted similar Taxing Acts to govern assessment of tax in these particular fields, one instance of which is the Real Property Gains Tax Act 1976 (Act 169) (the said Act). From a perusal of the relevant provisions, provisions relating to assessment of tax, appeals and recovery of tax in the said Act are similar to the Income Tax Act 1967 (Act 53). D E

[5] In our instant case, ss. 14 and 15 of the said Act deal with the raising of notices of assessment by the appellant as set out in s. 17 of the said Act. The right to appeal against that assessment is enshrined in s. 18 of the said Act and we set out the same: F

> Right of appeal
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> 18(1) A person aggrieved by an assessment made on him may appeal to the Special Commissioners against the assessment in the same manner as an appeal against an assessment of income tax made under the Income Tax Act 1967, and the provisions of sections 99, 100, 101, 101(1A), 101(1B), 101(1C) and 102 of that Act, as far as they are applicable and with the necessary modifications, shall apply to an appeal against an assessment made under this Act as if:
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> (a) every reference in those sections to income tax or to tax were a reference to real property gains tax; and
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> (b) every reference in those sections to income were a reference to chargeable gains.

G H I

[6] On appeal to the Special Commissioners pursuant to s. 18 of the said Act, errors or mistakes could be raised, and thereafter under the latter section, when the appeal is finally disposed of, the assessment would be final. In the present case, the respondent had not availed itself of its statutory rights pursuant to this provision.

[7] As the respondent did not avail itself of the appeal process under s. 18 of the said Act, the tax then became due and payable, and the appellant was entitled to file recovery proceedings for the tax due, pursuant to s. 23 of the said Act. We set out s. 23 *in toto*:

> **Recovery by suit**
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> 23(1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.
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> (2) The Director General and all authorised officers shall be deemed to be public officers authorised by the Minister under subsection 25(1) of the Government Proceedings Act 1956 [Act 359], in respect of all proceedings under this section.
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> (3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 21(4).

[8] Having filed the recovery proceedings in the High Court, the appellant then filed an application for summary judgment pursuant to O. 14 of the Rules of the High Court 1980. The High Court had allowed the application but the Court of Appeal by a majority decision set aside the High Court order, and set it down for trial.

[9] In the majority judgment of the Court of Appeal, Hamid Sultan Abu Backer JCA, delivering the majority judgment, held that since there was no chargeable gain, as the consideration sum was not paid, that constituted a triable issue. We reproduce paras. 14, 15 and 16 of the majority judgment, which read as follows:

> [14] In *Matair Suhaili & Anor v. Rose Foo Chin Lau & Ors* [2007] 5 CLJ 406 the Court of Appeal on the facts made the following observation:
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> > under real property gains tax 1976, a real property gains tax is chargeable in accordance with the Act in respect of chargeable gain on the disposal of real property and there is chargeable gain ... chargeable gain is deemed to accrue on the date on which the whole of the value of the consideration was received by the 1st Defendant.
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> [15] We are surprised to note that the learned counsel for the Revenue Department did not bring to our attention a reported decision of Justice Aziah binti Ali J (as her Ladyship then was) in the case of *Ketua Pengarah Hasil Dalam Negeri v. The Petaling Rubber Estates Limited* [2010] MLJU 1301; where on similar issues the Special Commissioners have *inter alia* asserted

that to be liable to real property gains tax, there must be chargeable gain within the ambit of section 3 of the Act. In that case the Special Commissioners' decision was upheld by the High Court and that will mean it will be wrong for the Revenue Department to raise an assessment when in law and fact the assessee is not liable to RPGT at the material time.

[16] We do not think it is necessary to go into further adumbration on the Respondents right to summary judgment at this stage, as it is very clear from the instant case the Appellant has raised triable issues which ought to be ventilated at a full trial taking into account that the Act will not apply to all persons and the *sine qua non* for the Revenue Department to trigger the Act must relate to a disposal as envisaged by the Act. It must not be forgotten that where the language of the Act is clear and explicit the Court is duty bound to give effect to it. We must make it clear in the instant case the duty of the trial court is to ascertain whether there was in fact a disposal as envisaged by the Act. If the court comes to a finding in favour of the Revenue Department then the liability and/or quantum arising from the assessment cannot be a subject matter of dispute in the court exercising its original jurisdiction and that jurisdiction in the first instance is vested only with the Special Commissioners.

[10] Before giving our legal views, we discuss first the cases on this area of the laws and propositions emanating from them, with the *locus classicus* being the case of *Sun Man Tobacco Co Ltd v. Government of Malaysia* [1973] 1 LNS 144; [1973] 2 MLJ 163, a decision of this court where the Government of Malaysia was given liberty to enter final judgment. We refer to the judgment of Gill FJ and we quote from p. 164 right-hand column para. I to para. C, p. 165 which reads:

I agree with the learned Lord President that this appeal should be dismissed with costs. There is a string of decided cases (*ABC v. The Comptroller of Income Tax, Singapore* [1959] MLJ 162, 166; *Comptroller of Income Tax v. RST* [1962] MLJ 216; *Comptroller of Income Tax v. A Co Ltd* [1966] 2 MLJ 282 284; *Comptroller of Income Tax v. AB and Comptroller of Income Tax v. CD Ltd* [1967] 1 MLJ 11; *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd* [1969] 2 MLJ 98; *Government of Malaysia v. DC* [1973] 1 MLJ 161 and *Comptroller-General of Inland Revenue v. NP* [1973] 1 MLJ 165) in which *it has been held that the effect of the relevant provisions of the Income Tax Act, 1967 is that on the service of a notice of assessment on the person assessed the tax payable under the assessment becomes due and payable at the place specified in the notice, whether or not the person appeals against the assessment, and can then be recovered by the Government by civil proceedings as a debt due to the Government. On such civil proceedings being brought by the Government, the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased*. (emphasis added)

[11] We refer also to *Government of Malaysia v. Abdul Rahman* [1974] 1 LNS 40; [1975] 1 MLJ 276, a decision of the High Court and to the judgment of Arulnandom J (as he then was), which was approved in the Supreme Court decision of *Chong Woo Yit v. Government of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9; [1989] 1 MLJ 473, which we now quote and agree with:

> In this case after the Notices of Assessment were served and the tax was not paid the Government instituted proceedings for the whole tax payable. The court under section 106(3) cannot entertain any plea that the tax or additional tax was not correctly assessed. In the case of *A.B.C. v. The Comptroller of Income Tax, Singapore* it was held that notices of assessment for several years were valid. Regarding the question whether triable issues or objections to the tax entitled the defendant to leave to defend I only need to refer to the recent Federal Court decision in *Sun Man Tobacco Co. Ltd. v. Government of Malaysia* where it was held that the court was right in giving leave to the Government to sign final judgment and in holding that if the taxpayer wished to dispute that the amount of tax sought to be recovered was excessive, incorrectly assessed, under appeal or incorrectly increased, he had to do so by way of appeal to the Special Commissioners.

It was obvious that the majority judgment of the Court of Appeal failed to consider any of those cases nor afforded an explanation, despite the strong pronouncement of law in these cases, why it felt that the issue of no chargeable gain constituted a triable issue in the context of the said Act.

[12] We hold that pursuant to s. 21(1) of the said Act, once a notice of assessment has been served, the tax payable will be due and payable. If the respondent felt aggrieved by the issue of no chargeable gain arising, the respondent should have lodged an appeal to the Special Commissioners of Income Tax pursuant to s. 18 of the said Act. Since no appeal was lodged, this issue was precluded from being raised as a triable issue pursuant to s. 23(3) of the said Act. We find that the majority judgment of the Court of Appeal failed to consider all the relevant provisions of the said Act particularly s. 18 and s. 23(3) of the same; it is therefore *per incuriam* the provisions of the said Act.

[13] For the aforesaid reasons, we find the majority judgment of the Court of Appeal as being in error, in light of the relevant provisions of the said Act, and therefore prefer the views expressed in the dissenting judgment of the Court of Appeal.

[14] In the upshot:

(i) If a notice of assessment is raised, and if a taxpayer wishes to raise issues pertaining to the amount, the correctness or the legality of the assessment raised, the taxpayer should invoke s. 18 of the said Act. If this is resolved in the taxpayer's favour then whatever tax paid can be refunded as an overpayment pursuant to s. 24 of the said Act.

(ii) If the taxpayer fails to do so, then these issues cannot be raised as triable issues in an application for summary judgment by virtue of s. 23(3) of the said Act.

[15] We therefore order the majority judgment of the Court of Appeal be set aside *albeit* by consent. On the premise of this appeal being allowed by consent, we answer the leave question posed as follows:

(i) Question (a) – No

(ii) Question (b) – No

(iii) With regards to question (c) the proper forum to hear the said issue would be the Special Commissioners of Income Tax pursuant to s. 18 the said Act.

[16] We therefore allow the appeal with costs.